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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, vs. AT&T CORP., et al. Defendants.	No. C-06-00672-VRW CLASS ACTION PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE AND CONSOLIDATE SIMILAR AND PENDING CASE NUMBER A-05-CA-682-LY IN THE WESTERN DISTRICT OF TEXAS AT AUSTIN

I. INTRODUCTION

On June 6, 2006, the Reverend Willie H. Ellis moved to intervene as a party, and moved to consolidate his case, currently pending in the Western District of Texas, Austin Division, with the present case. Plaintiffs hereby oppose both of these motions.

II. ARGUMENT

A. Any Transfers Between District Courts Must Be Made by the Judicial Panel on Multidistrict Litigation

Because *Ellis v. US Chapters of Scottish Rite Freemasonry Brotherhood, et al.*, Case Number A-05-CA-682-LY ("*Ellis*"), is pending in the Western District of Texas, Austin Division, consolidation through a motion by the party is inappropriately filed before this Court. Pursuant to 28 U.S.C. §1407(a), if Rev. Ellis believes that his action involves common questions of fact, a motion for transfer must be made to the Judicial Panel on Multidistrict Litigation:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation . . . .

28 U.S.C. §1407(a). Because *Hepting* and *Ellis* are pending in different district courts, this motion is inappropriately before this Court.

B. Intervention of Right or Permissive Intervention Are Not Appropriate Here

1. Intervention of Right Is Not Available Where There Is No Significant Protectable Interest in the *Hepting* Action

To intervene under Fed. R. Civ. P. 24, an application may be made to intervene of right or through permissive intervention. Intervention of right is appropriate:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). In particular, the Ninth Circuit requires an applicant for intervention of right to demonstrate that: (1) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely;

and (4) the existing parties may not adequately represent the applicant's interest. *See United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).

Here, Rev. Ellis has not demonstrated that he has a significant protectable interest relating to the transaction that is the subject of this action. The *Hepting* case involves the illegal interception of communications in transit and the illegal disclosure of stored communications data by the corporate AT&T defendants. Rev. Ellis alleges that freemasons and members of Al Qaeda have used a complex code to send non-verbal communications inciting domestic and foreign acts of terror. Motion to Intervene at 2.[1] Although Rev. Ellis suggests that "AT&T, Verizon, [and] South Western Bell . . . have made no objections to the complaint filed against them," it is not clear whether Rev. Ellis has included these defendants in his case. Motion to Intervene at 1. *Ellis,* although originally attempted to be filed as a "criminal" complaint, was apparently converted to a civil complaint by the clerk of the court's staff in the Western District of Texas. Scarlett Decl., Ex. A at 1 (stating that the staff of the Western District of Texas explained criminal complaints are "traditionally brought by the U.S. Attorney's [sic] or F.B.I.").[2] The only named defendant seems to be the US Chapters of Scottish Rite Freemasonry Brotherhood, although the *Ellis* court has issued an order to show cause because there has been no showing that summonses were properly served upon defendant(s). Scarlett Decl., Exs. B-C. Regardless of whether AT&T Corp. or AT&T Inc. are defendants in the *Ellis* action, however, allegations regarding the existence of a code included in mass media does not create a "significant protectable interest" necessitating intervention in the *Hepting* action. *United States*, 370 F.3d at 919.

Although it is also unclear whether or not Rev. Ellis may be a class member, this is also irrelevant to the intervention analysis. "If the court determines that the absent class members are adequately represented, intervention as of right under Rule 24(a) should be unavailable." *DeJulius v.*

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[1] "Motion to Intervene" refers to the Motion to Intervene and Consolidate Similar and Pending Case Number A-05-CA-682-LY in the Western District of Texas at Austin, filed on June 6, 2006.

[2] "Scarlett Decl." refers to the Declaration of Shana E. Scarlett in Support of Plaintiffs' Opposition to Motion to Intervene and Consolidate Similar and Pending Case Number A-05-CA-682-LY in the Western District of Texas at Austin.

New Eng. Health Care Emples. Pension Fund, 429 F.3d 935, 943 (10th Cir. 2005) (citing 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure §1799, at 246 (3d ed. 2005)).

2. Permissive Intervention Is Not Available Where There Are No Common Questions of Law or Fact

An applicant is permitted to intervene in an action "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). Again, the factual predicates underlying Rev. Ellis' claims and those of the *Hepting* class action are much different. Rev. Ellis brings a complaint against the US Chapters of Scottish Rite Freemasonry Brotherhood for participating in a scheme to incite acts of domestic and foreign terror. The *Hepting* plaintiffs seek to stop the illegal interception and disclosure of the communications of a nationwide class of AT&T subscribers. No common questions of law or fact exist.

Although it is not clear whether Rev. Ellis might be seeking intervention because he is a member of the class, his rights here will be adequately protected by the existing parties. Even if Rev. Ellis had satisfied the necessary prerequisites for permissive intervention, his intervention is unnecessary where his interests are adequately represented by the existing parties. *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986).

III. CONCLUSION

For all the reasons above, plaintiffs respectfully request that this Court deny Rev. Ellis' motion to intervene and consolidate.

DATED: June 19, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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